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FHWA OVERSIGHT CURES NEPA CONSULTANT CONFLICT OF INTEREST

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The Sixth Circuit rendered its decision in this matter on January 9, 2003. The case was appealed from the USDC for the Northern District of Ohio, where FHWA and ODOT received a favorable decision. The Ohio Department of Transportation prepared an EA for the reconstruction of 16 miles of U.S. 30 on new alignment. Much of the case in the district court centered on the issue of an EA versus an EIS. However, the Plaintiffs also raised a conflict issue, and this issue was the principle subject of the circuit court opinion.

In June 1993, ODOT hired a private consulting firm to conduct a preliminary study of this project, including preparation of an EA. In July 1997, three years before the completion of the EA, ODOT entered into a second agreement, with the same firm, for engineering, design, and construction work for the final highway project. The appellants notified FHWA, complaining that the second contract violated federal timing regulations and created a conflict of interest. The design work was financed by the state alone, and no federal funds were committed to the project prior to completion of the EA, and thus FHWA's review would be impartial, and the agency so stated to the appellants. An EA was issued in April 2001.

The circuit court found that entering into the second contract was a clear violation of CEQ and FHWA regulations which prohibit final design activity, and any action that would limit the choice of reasonable alternatives (23 CFR 771.113(a) (1)(ii); 40 CFR 1506.1 (a)(2)). The consultant also failed to file a disclosure statement regarding a conflict of interest, despite the second contract's promise of final design work, which provided the consultant with a "financial interest" as defined by regulations. The court

found this to be a violation of CEQ regulations. 40 CFR 1506.5(c). The district court found that the defendants had violated these regulations, but that such violations were harmless, because independent oversight by FHWA cured the procedural misconduct committed by ODOT and consultant. This was affirmed at the circuit court level. The court cited TEA-21's allowance for the same contractor to perform both EA and final design work, as a validation of the "oversight test" doctrine. The court emphasized that ODOT's own independent analysis did nothing to convince them of the integrity of the overall process. "It is only FHWA's oversight that, in the context of this case, permits the Court to affirm the final agency decision." at page 9.

The circuit court affirmed the district court decision, allowing the project to proceed.

Burkholder v. FHWA, 6th Circuit No. 02-3394, January 9, 2003

CONTAMINATION IN EMINENT DOMAIN: A TRIO OF NEW CASES

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Courts in Michigan, New Jersey, and Connecticut have recently weighed in on the admissibility of contamination and remediation cost evidence in an eminent domain proceeding. The evidence would be admissible in New Jersey and Connecticut, and inadmissible in Michigan. For those of you that are counting, that's at least nine jurisdictions, including Colorado, Florida, Kansas, Tennessee, California, Minnesota and New York on the side of admissibility, and three, including Illinois and Iowa, on the other side. (However, the eminent domain statute in Illinois was amended subsequently to the decision in Department of Transportation v. Parr, 259 Ill. App.3d 202 (1994) to provide for admissibility. See 735 ILCS 5/7-119. The constitutionality of that provision, which Parr suggests should be an issue, has yet to be decided.)

Starting in Michigan, the Court of Appeals decided against the admissibility of cleanup costs for the following reasons:

1. The "inequity" of deducting remediation cost;
2. Contaminated properties are like "snow flakes"; no two are alike. Finding comparables is virtually impossible; and
3. Michigan's Procedural Act precluded it and provided that a separate cost recovery action be brought. (Michigan law, the Court recognized, may be unique in that regard.) Silver Creek Drain District v. Extrusions Division, Inc. et al., 245 Mich. App. 556, 630 N.W.2d 247 (2001).

Turning to New Jersey, the Superior Court of New Jersey, Appellate Division held that environmental contamination is relevant to a valuation of property for the reasons that:

1. A willing buyer would not "ignore the fact of contamination . . ., including specifically the cost of remediation in deciding how much to pay for property";
2. Contamination may also restrict a property's use;

3. Potential liability cannot be ignored; and
4. To ignore it would result in "an inflated award that does not represent the property's true market value."
The Housing Authority of the City of New Brunswick v. Soyoam Investors, L.L.C. et al., 810 A.2d 1137, 2002 N.J. Super. LEXIS 480 (2002).

Finally, the Supreme Court of Connecticut discussed the issue at great length in Northeast Economic Alliance, Inc. et al. v. ATC Partnership et al., 256 Conn. 813, 776 A.2d 1068, 2001 Conn. LEXIS 285 (2000) and decided that the effect, if any, contamination and remediation costs had on the property's fair market value was admissible. For the sake of brevity, all of the arguments considered and decided by this court will not be discussed here.

However, in a section of its discussion on whether considering contamination and cleanup costs in eminent domain improperly allocates environmental liability, as the court in PARR in Illinois suggested, the following eerie and chilling hypothetical is presented:

> "Assume a parcel of property with a building that is taken by a municipality. Just prior to the date of condemnation, *there is an airplane crash involving three airplanes, which collide and destroy the building*. In a tort action, damages would be allocated among the airlines. Under the defendant's argument, carried through to its logical conclusion, the condemnee should receive the value of the parcel as though the building had not been destroyed." ATC, 776 A.2d 1083 (Emphasis added.)

As the movie Magnolia suggests, is it just a coincidence that three airplanes within months of this decision would be crashed into the World Trade Center and Pentagon? I hope so.

NPDES PHASE II REGS MOSTLY UPHELD
USE OF NOI REJECTED

After many years in the making and at least one trip to Congress, USEPA adopted new rules for discharges from small municipal storm sewers and from construction sites that range from one to five acres. The regs were challenged in three different courts of appeal. The three appeals were consolidated in a 100-page opinion from the Ninth Circuit on January 14, 2003. Both categories of dischargers were allowed to apply for individual permits or could comply with a general permit by filing a notice of intent to comply.

One group of challenges concerned the Tenth Amendment to the U.S. Constitution. Each regulated discharger was required to police its system to get rid of illicit discharges of polluted non-stormwater. Some municipalities felt that they were being coerced to do the Federal government's business by regulating the conduct of third parties. The Court felt that the Tenth Amendment was not being violated because the municipalities had the choice to either stop discharging downstream to "federal waters" or they could apply for an individual permit. Some challenges dealt with the First Amendment to the U.S. Constitution. These arguments said that the municipalities should not be forced to publish educational materials that discussed the problems with soil erosion. The Court

felt that "informing the public about safe toxin disposal is non-ideological…" and therefore permissible.

The environmental groups challenged the fact that many dischargers were not required to apply for a permit. All they had to do was agree to comply with a general permit which avoided any public notice or review by the permitting authority. The Court agreed with the argument that this process did not include adequate public involvement and did not insure that each discharger would reduce its discharge to the maximum extent practicable as required by the law. *Environmental Defense Center v. USEPA,* 319 F.3d 398 (9thCir. 2003)

COURT REFUSES TO RECONSIDER RULING IN UTAH LEGACY PARKWAY CASE ON FEDERAL AGENCIES ADOPTING EIS WRITTEN BY STATE

A prior edition of this newsletter reported on the 10th Circuit Court of Appeals decision that rejected the EIS/ROD that approved the Legacy Parkway highway project in Utah. FHWA and the Corps of Engineers sought rehearing on the part of the opinion that found that both agencies erred when they relied on an EIS written by the Utah DOT. The Court declined to reconsider its ruling because the arguments raised by the Federal agencies should have been raised in their response brief in the prior appeal. *Utahns for Better Transportation, et al. v. USDOT, et al.,* 319 F.3d 1207 (10th Cir. 2003)

COURT LACKS JURISDICTION TO FORCE CORPS TO REVOKE 404 PERMIT FOR CLEVELAND AIRPORT WORK

When FAA approved a revised airport layout plan for the Cleveland Hopkins International Airport, the plan called for filling along two creeks. The Ohio EPA decided to waive its certification of compliance with state water quality standards under Section 401 of the Clean Water Act. On review, it was determined that OEPA should not have waived certification -- it should have certified or denied. The airport opponents sued the Corps and USEPA when they both refused to revoke the 404 permit that was issued based on the waiver. The Court found no jurisdiction under the citizen suit provision of the Clean Water Act because there was no 60-day notice. There was no jurisdiction under Section 313 of the Clean Water Act because the Federal government was not directly responsible for the filling. Finally, there was no jurisdiction under the Administrative Procedure Act because the Corps decision not to revoke was discretionary. *City of Olmstead Falls v. USEPA, et al. ,* 233 F. Supp.2d 890 (N.D.Ohio, 2002)

NEW MEXICO DESIGN/BUILD ADD LANES HIGHWAY JOB CAN PROCEED

FHWA approved a project to add lanes to a 37.5-mile stretch of highway in New Mexico. The ROD concluded that there was no use of historic Section 4f resources, but that if any additional resources were discovered during design and construction, a programmatic agreement under Section 106 would address protection of those resources. The Court went along with this approach because the job was already done with 30% design, which is normal for NEPA compliance for highway construction jobs. There was an apparent conflict when the same consulting firm wrote the EIS and was the administrator on the design/build job, but adequate FHWA oversight cured the problem. The case was then transferred to New Mexico for further proceedings. *Valley Community Preservation Committee v. Mineta,* 231 F. Supp. 2d 23 (D.D.C., 2002)

MOTOR CARRIER SAFETY REGS ISSUED UNDER NAFTA NEED EIS AND CONFORMITY DETERMINATION

After the Federal Motor Carrier Safety Administration (FMCSA) issued regulations which allowed trucks from Mexico to operate outside of the border zone, a coalition of unions and environmental groups sued to get the regulations overturned. FMCSA issued a preliminary environmental assessment for some of the rules which concluded that no EIS was necessary and then concluded that the remaining rules were categorically excluded from compliance with NEPA. A similar categorical exclusion was issued to exempt the rulemaking from the need to find conformity with any state implementation plans.

The Court concluded that at least one plaintiff group had standing because of allegations of additional truck exhaust and then went on to review the decision not to prepare an EIS. The Court rejected the split of emissions that FMCSA attributed to its regulations and to an Order issued by the President, which lifted a moratorium on Mexican trucking. The President's Order was reasonably foreseeable so all of the emissions should have been considered together. The conclusion that the increase in emissions was insignificant in relation to national emissions was rejected because the increase could be significant in certain areas. Similar conclusions that overall truck emissions would not increase were rejected for failure to find support by any credible analysis.

The decision to categorically exclude certain FMCSA rules was rejected because these rules had not been previously listed by USDOT as decisions that were likely not to have significant environmental impact. Since the emissions analysis was flawed under NEPA, it was similarly flawed under the conformity provisions of the Clean Air Act. FMCSA simply had no credible analysis to support its conclusion that the emissions from its regulations would not rise to the levels that require analysis under EPA's rules for findings of conformity. *International Brotherhood of Teamsters, et al. v. USDOT, et al.,* 9th Circuit No. 02-71249, January 16, 2003

EIS/4F FOR NEW INTERCHANGE TO SERVE NEW NY AIRPORT OK

The New York State Thruway Authority proposed to construct a new interchange on I-84 and improvements to connecting roads to direct traffic to Stewart International Airport. The opponents challenged the determination that much of the land that would be used for the project was not subject to Section 4f. The Court noted that the property was publicly owned and had been managed for recreational purposes for many years, but held that it had been acquired for transportation purposes and never formally designated as parkland. The traffic data was properly analyzed by the State and Federal transportation agencies, and a nearby stand-alone interchange reconstruction project was not improperly segmented from this job. Some other projects either were included in the cumulative impacts analysis or were properly excluded because the projects were not still viable. *Stewart Park and Reserve Coalition v. Slater,* 225 F. Supp.2d 219 (N.D.N.Y. 2002); *stayed pending appeal,* 232 F. Supp.2d 1 (N.D.N.Y 2002)

CORPS DREDGING IN LOWER SNAKE RIVER PRELIMINARILY ENJOINED

The Corps of Engineers issued an EIS/ROD based on a 20-year management plan for the Lower Snake River in Idaho and Washington. Navigation is maintained by dams and dredging a channel. The Court had to decide first whether the entire 20-year plan was

before it or just the plans for 2002-03. The Court found that the 20-year plan was sufficiently final for review. The Court rejected the Corps' assertion that it did not have to consider alternatives such as reducing sedimentation by encouraging better upstream farming and forestry practices and reducing the Congressionally mandated navigational depth during certain seasons. Even though these were beyond the Corps' jurisdiction, they could not be dismissed if they were otherwise reasonable.

The Plaintiffs also challenged the biological opinion issued by the National Marine Fisheries Service on the impacts of the project on salmon species. The Court found that NMFS focussed too much on impacts to the species and not enough on impacts to the critical habitat. The NMFS was also at fault for issuing an incidental take statement allowing some protected salmon to be killed without including a trigger to cause the agency to reconsider its decision based on actual impacts. *National Wildlife Federation v. National Marine Fisheries Service,* 235 F. Supp.2d 1143 (W.D.Wash. 2002)

FLORIDA HIGHWAY OUTDOOR ADVERTISING ACT AND RULES DO NOT VIOLATE FIRST AMENDMENT

The owner of an adult establishment was cited by Florida DOT for building a sign without a permit along I-95. The owner had a hearing on whether a permit was needed, claiming that his sign was on-premise. The ALJ ruled that the sign was off-premise and needed a permit. Florida DOT agreed and ordered the sign to be removed. On appeal the DOT's order was not discussed. The owner decided to challenge the regulatory scheme as a violation of his right to express commercial speech.

There was no dispute that the Florida law and rules, which are typical of every State DOT, were content neutral and were a prior restraint on speech. The Court found that the scheme needed to implement a substantial governmental interest, must advance that interest, and must not reach further than necessary to accomplish its objective. The substantial governmental interest being advanced was traffic safety and the appearance of the highways. The interest was advanced by standards that limited spacing between billboards and their structural characteristics. The program did not reach further than necessary because it did not ban all outdoor advertising and provided for exceptions for on-premise signs, for sale or lease signs, and other categories of exceptions. *Café Erotica/We Dare to Bare/Adult Toys/Great Food/Exit 94, Inc. v. Florida Dept. of Transportation,* 830 So. 2d 181 (Fla. App. 1 Dist. 2002)

CITIZENS HANDBOOK AVAILABLE ON ENVIRONMENTAL JUSTICE AND TRANSPORTATION

The Institute of Transportation Studies at the University of California Berkeley has published a pamphlet advising citizens on how to push for justice and equity in transportation plans, programs, and projects. The pamphlet provides one of the best explanations yet on how metropolitan planning organizations evaluate transportation plans for their effectiveness and shows interested groups how they can participate in the development of these plans. This is not confrontational. There is no scolding message and a call to action. This is instead a sophisticated but understandable approach to explaining a complicated process to the consumers who should enjoy the benefits of their transportation system. Consider it strongly recommended reading. Cairns, Greig, Wachs*; Environmental Justice & Transportation: A Citizens Handbook,* ITS Publications, itspubs@socrates.berkeley.edu, 510/643-2591.

CHAIR'S CORNER

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Plans are underway for the 42nd Annual Workshop on Transportation Law to be held at the Omni Royal Orleans in New Orleans, LA, July 20-23, 2003. The Preliminary Program and Registration information are available on the TRB website. The location and program promise to be exciting. Ed Kussy will moderate a session on Air and Traffic Modeling, and we are jointly sponsoring a session along with the Transit Committee on Reauthorization with Scott Biehl moderating. Our committee will meet on the 21st.

Our specialized area of the law is never dull. Our challenges continue to become more and more sophisticated, and our responses need to change to meet the needs of our clients. This committee is one of the best mechanisms available for us to remain current, and even ahead of the curve.

Many thanks to Rich Christopher for his continued diligence in preparing this newsletter.

NEXT COPY DEADLINE IS JUNE 16, 2003

Please get your submissions for the July, 2003 *Natural Lawyer* into the Editor by the close of business on June 16, 2003. Please use the e-mail address or FAX number listed at the beginning of the newsletter or mail to Rich Christopher, IDOT, 310 South Michigan, Chicago, IL 60604.